

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8390

Petition of Vermont Department of Public Service for an)
investigation into the adequacy of Telephone Operating)
Company of Vermont LLC, d/b/a FairPoint)
Communications, provision of service quality)

Order entered: 1/29/2015

PROCEDURAL ORDER REGARDING PROTECTIVE AGREEMENT

Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications ("FairPoint"), or other parties to this proceeding may have information that they allege is of a confidential and proprietary nature and that they have been, or may be, asked to provide in the course of this proceeding to the Vermont Public Service Board ("Board"), the Vermont Department of Public Service ("Department"), and certain other parties, the names of which are, or will be, set forth on the signature pages and approved schedules to the Protective Agreement, as defined below. (FairPoint, the Department, and each other party will be sometimes referenced herein, where the context requires, as a "Party" or, collectively, as the "Parties"). To preserve the confidentiality of that information while facilitating disclosure of information in this docket, the Parties have entered into a Protective Agreement, dated December 8, 2014, attached hereto (the "Protective Agreement"). Schedule I of the Protective Agreement, as may be amended in accordance with the terms of the Protective Agreement, describes information that the disclosing Party alleges may result in financial or competitive harm to it or its parent company/affiliates, if disclosed on the public record (which information is specifically described in Schedule I, as amended from time to time, and is herein referenced as the "Allegedly Confidential Information").

Pursuant to that Protective Agreement and to preserve the confidentiality of Allegedly Confidential Information, FairPoint, the Department, and such other parties that have executed the Protective Agreement request that the Board issue a Procedural Order implementing the terms and procedures of the Protective Agreement.

On December 19, 2014, Local 2326 of the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") filed by electronic e-mail comments objecting to the proposed Protective Agreement.¹ IBEW opposes the authorization of any protective agreement at this juncture in the proceeding, as, in its view, the protection of information should be made only by motion before the Board. IBEW specifically objects to the discretion given to the Department to decide what information merits protection under the Protective Agreement, without regard to the positions of other parties to this proceeding. IBEW also objects to what it considers an overly broad scope, with respect to who may have access to disclosed information under the proposed Protective Agreement. IBEW objects that the Protective Agreement as proposed would prevent disclosure "even to other state and federal agencies investigating issues relating to FairPoint's service quality."

Based on our review of IBEW's concerns, we conclude that IBEW misunderstands the nature and function of protective agreements that may be submitted to the Board for approval within the context of specific proceedings. As noted in paragraph 21 of the proposed Protective Agreement, the purpose of such agreements is "to expedite the production of information, to minimize the time spent in discovery disputes, and facilitate the progress of [...] investigations to the fullest extent possible." The same paragraph further explains that the Protective Agreement does not constitute an admission by any Party regarding the scope of statutory rights to information; nor does it constitute a waiver of rights to raise confidentiality issues in future dockets. In other words, the Protective Agreement is a docket management tool for the proceeding in which it is introduced – it does not infringe on the rights an individual may have under the law in other fora or other proceedings. Moreover, under the terms of the proposed Protective Agreement, any Party to the Protective Agreement is entitled to object to an averment of confidentiality and any Party may request review by the Board of such averments or of proposed modifications to the agreement. *See, e.g.*, paragraphs 1, 6, 8, 16 (establishing, *inter*

1. We note that Alfred Gordon O'Connell, Esq. of Pyle Rome Ehrenberg PC, if he intends to represent IBEW in this proceeding, must obtain Board permission to appear *pro hac vice* in compliance with Board Rule 2.201 before participating in this proceeding on behalf of intervenor IBEW.

alia, procedures and standards for recourse under the terms of the agreement). *See also*, paragraph 2 of this Order (establishing that any request for protection of "Allegedly Confidential Information" must be submitted to the Board). Thus, if IBEW believes that particular documents should not be treated as Allegedly Confidential Information, it is free to file a motion requesting that the Board exclude the document from coverage under the Protective Agreement. We note that parties are not obligated to join the agreement, but are entitled to do so, to avail themselves of the rights contained therein.

Rule 26(c)(7) of the Vermont Rules of Civil Procedure, applicable here pursuant to Board Rule 2.214(A), specifically authorizes the issuance of protective orders, for good cause shown, so as to protect "confidential research, development, or commercial information" from disclosure by the party or parties receiving it for purposes of discovery and presenting testimony in a given case.

The Board finds good cause to order implementation of the proposed Protective Agreement and further finds that such Agreement is appropriate, useful, and reasonable, but with the following clarifications. Today's Protective Order shall govern only the protection of documents and information provided in disclosures and discovery. If a Party wishes to keep confidential any material that is proffered for inclusion in the evidentiary record, that Party must present a properly supported motion for protection of that material.

We note that paragraph 24 of the Protective Agreement refers to an addendum that was not attached to the filing. The language of that paragraph indicates that the parties are not seeking Board approval of the addendum. Our Order, therefore, does not encompass paragraph 24 of the Protective Agreement.

Therefore, IT IS HEREBY ORDERED that Allegedly Confidential Information provided by a Party pursuant to the Protective Agreement shall be treated in this proceeding as follows:

1. The Protective Agreement, filed with the Board on December 8, 2014, and attached hereto, is approved and adopted as part of this Order.
2. For each document or information response that a Party wishes to treat as Allegedly Confidential Information, the disclosing Party must submit a detailed, document-specific (or information-specific) averment of the basis for such treatment, which addresses the following, to

the extent that the disclosing Party relies upon that factor as the basis for an assertion of confidentiality:

- a. Identification of the specific document or information for which confidential treatment is sought;
- b. Explanation of the degree to which the document or information contains a trade secret or other commercially sensitive information, or is privileged;
- c. For documents and information alleged to contain trade secrets or other commercially sensitive information,
 - i. the extent the information is known outside the disclosing Party and/or its parent or affiliates,
 - ii. the extent the information is known by employees and independent contractors,
 - iii. the measures taken to guard secrecy,
 - iv. the value of the information to the Party, its parent, its affiliates, or competitors,
 - v. the amount of effort or money used to develop the information,
 - vi. the ease or difficulty for others in acquiring or duplicating the information, and
 - vii. an explanation of how disclosure of the information could result in cognizable harm sufficient to warrant a protective order;
- d. Justification of the period during which the Party asserts that material should not be available for public disclosure;
- e. Explanation of whether partial disclosure, or disclosure of redacted versions, can adequately protect the Allegedly Confidential Information; and
- f. Any other information that the Party seeking confidential treatment believes may be useful in assessing whether the document or information should remain confidential.

1. If a Party wishes to prefile any testimony or exhibits that include or otherwise disclose Allegedly Confidential Information, that Party must give five business days' advance notice to

counsel for the Party or other person who designated the information as Allegedly Confidential. Any Party may move the Board for an order that the testimony or exhibits be filed under seal or under other conditions to prevent unnecessary disclosure.

a. If such motion is filed within the five business days' advance notice period, the proponent of the testimony and exhibits shall place them in a sealed record by filing such documents in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the contents (exhibit, report, etc.), and a statement that it shall not be opened or released from custody of the Clerk of the Board except by order of the Board or Hearing Officer. Notwithstanding such a statement, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information, but shall not disclose the contents of any such sealed information to any person who has not agreed to be bound by the Protective Agreement. The Board will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information.

b. If no such motion is filed by the end of the five business days' advance notice period, the testimony and exhibits may be filed as a document available for public access.

2. At any hearing or conference in this proceeding, no witness may be questioned with respect to any Allegedly Confidential Information unless examining counsel has provided advance notice to counsel for any Party or other person who designated the information as allegedly confidential. To the extent possible, such notice shall be given prior to the commencement of the hearing or conference. Any Party may move the Board for an order that the testimony be received in camera or under other conditions to prevent unnecessary disclosure. If such motion is made, the Board will then determine whether the testimony should be received in camera or subject to other protection.

3. Upon receipt of an executed Protective Agreement signature form, that is, either Schedule IIa or IIb to the Protective Agreement, counsel for the disclosing Party shall forward one copy of the form to the Clerk of the Board.

4. All documents filed with the Board that are subject to the Protective Agreement as Allegedly Confidential Information and any documents that discuss or reveal documents that constitute Allegedly Confidential Information shall be placed in a sealed record by filing such information in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the contents (discovery response, report, etc.), and a statement that it shall not be opened or released from custody of the Clerk of the Board except by order of the Board. Notwithstanding such a statement, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information, but shall not disclose the contents of any such sealed information to any person who has not agreed to be bound by the Protective Agreement.

5. The Board will retain jurisdiction to make such amendments, modifications and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications, or additions resulting from a motion made pursuant to the Protective Agreement. Any Party or other person may apply to the Board for an amendment, modification or addition to this Order.

6. The Board cautions the Parties that there must be a good-faith basis for all claims of confidentiality. Claims without such a basis may result in sanctions against the Party making the unfounded claim. A Party's public disclosure of information that it has designated as Allegedly Confidential may indicate that the Party lacked a good-faith basis for that designation.

SO ORDERED.

Dated at Montpelier, Vermont, 29th day of January, 2015.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/John D. Burke</u>)	BOARD
)	
)	OF VERMONT
<u>s/Margaret Cheney</u>)	

OFFICE OF THE CLERK

FILED: January 29, 2015

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)